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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 342

SAM ARSTEIN and BEN ARSTEIN,
Petitioners,

—against—

ROBERT REIS & COMPANY,
Respondent.

PETITIONERS' REPLY MEMORANDUM.

Each of the points made by the respondent in its answering brief is adequately covered by petitioners' main brief. Only two of respondent's contentions call for rejoinder: that petitioners should have appealed to the Court of Appeals as of right and that the petitioners have acquiesced in the constitutionality of the statute.

1. Section 588(1) of the Civil Practice Act provides that an appeal may be taken as of right from a decision of the Appellate Division only when there is "directly involved the construction of the constitution of the state or of the United States." This has been construed by the New York Court of Appeals to mean "not only directly but necessarily involved in the decision of the case." *Matter of Haydorn* v. *Carroll*, 225 N. Y. 84, 88 (1918); *People ex rel Lynch* v. *State Tax Commission*, 261 N. Y. 1, 4 (1933). As this case was presented to the Court of Appeals, that Court was called upon to decide whether the statute was applicable. Only if it were so decided, would the question of the constitutionality of the statute have arisen. Hence the case was one which did not

directly and necessarily involve the issue of constitutionality. For this reason, no appeal as of right could have been taken to the New York Court of Appeals.

Petitioners' position is substantiated by the fact that the New York Court of Appeals, when denying a motion for leave to appeal because an appeal of right lies, so states in its decisions. See cases cited by respondent at page 6 of its brief: *Jongebloed* v. *Erie Railroad Co.*, 296 N. Y. 994 (1947); *Estin* v. *Estin*, 296 N. Y. 308, 311-312 (1947); *Ibid* 296 N. Y. 828; *Albano* v. *Hammond*, 267 N. Y. 590 (1935). No such statement appears in the denial by the Court of Appeals of leave to appeal in this case.

2. Respondent seems to contend that petitioners, by not attacking *McNulty* v. *W. & J. Sloane*, 184 Misc. 835 (Sp. T. N. Y. Co., 1945), have in some way waived the questions presented to this Court. As the appendix to the petition demonstrates, these questions were expressly reserved in the state courts.

Respectfully submitted,

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H. N. ROTH,
PHILIP B. KURLAND,
For the Petitioners.